

MARK J. CONNOT
mconnot@foxrothschild.com
KEVIN M. SUTEHALL
ksutehall@foxrothschild.com
COLLEEN E. MCCARTY
cmccarty@foxrothschild.com
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Facsimile: (702) 597-5503
*Attorneys for Defendants Ahern Rentals, Inc.
and Xtreme Manufacturing, LLC*

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

DOUBLE JUMP, INC.

Debtor.

Lead Case No. BK-19-50102-gs
(Chapter 7)

Substantively consolidated with:

19-50130-gs	DC Solar Solutions, Inc.
19-50131-gs	DC Solar Distribution, Inc.
19-50135-gs	DC Solar Freedom, Inc.

Affects:

- ☐ DC Solar Solutions, Inc.
- ☐ DC Solar Distribution, Inc.
- ☐ DC Solar Freedom, Inc.
- ☐ Double Jump, Inc.
- ☒ All Debtors

CHRISTINA W. LOVATO, Trustee,

Plaintiff,

Adversary No.: 22-05001-gs

**DEFENDANTS' MOTION TO DISMISS
TRUSTEE'S ADVERSARY COMPLAINT
WITH PREJUDICE**

v.

AHERN RENTALS, INC. and XTREME
MANUFACTURING, LLC,

Defendants.

Date of Hearing: TBD
Time of Hearing: TBD
Estimated Time for Hearing: 30 Minutes

Defendants, Ahern Rentals, Inc. ("Ahern Rentals") and Xtreme Manufacturing, LLC
("Xtreme") (hereinafter collectively "Defendants"), by and through their undersigned counsel, hereby
submit this Motion to Dismiss with incorporated Memorandum of Points and Authorities, respectfully

requesting the Court to dismiss the Adversary Complaint (“Complaint”) filed by Plaintiff, Christina W. Lovato, Trustee (“Plaintiff” or “Trustee”), pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, which are made applicable to the above-captioned adversary proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure.¹ Defendants respectfully request the Court dismiss Plaintiff’s Complaint for failure to state a claim upon which relief may be granted and failure to plead fraud with particularity.²

Dated this 2nd day of March, 2022.

FOX ROTHSCHILD LLP

/s/ Mark J. Connot
 MARK J. CONNOT
 mconnot@foxrothschild.com
 KEVIN M. SUTEHALL
 ksutehall@foxrothschild.com
 COLLEEN E. McCARTY
 cmccarty@foxrothschild.com
 1980 Festival Plaza Drive, Suite 700
 Las Vegas, Nevada 89135
 Telephone: (702) 262-6899
 Facsimile: (702) 597-5503
 Attorneys for Defendants Ahern Rentals, Inc.
 and Xtreme Manufacturing, LLC

¹ References herein to the Bankruptcy Code refer to Title 11 of the United States Code (11 U.S.C. §§, *et seq.*), as applicable. References herein to the Bankruptcy Rules refer to the Federal Rules of Bankruptcy Procedure, as applicable. References herein to the Federal Rules refer to the Federal Rules of Civil Procedure, as applicable.

² Pursuant to Rule 7012(b), a defendant does not need to indicate whether it consents to entry of final orders or judgment by the Bankruptcy Court until it serves a responsive pleading. Accordingly, each Defendant reserves its rights with respect to this issue.

MEMORANDUM OF POINTS AND AUTHORITIES**I.****INTRODUCTION/FACTUAL BACKGROUND**

No matter how artfully the Trustee may have designed her pleading seeking to avoid and recover all unextinguished transfers to Defendants Ahern Rentals and Xtreme, respectively, the deficiencies of this misdirected adversary proceeding are easily revealed and ultimately fatal. To start, it is undisputed that the challenged transfers to Ahern Rentals, which number 17 and are listed in Exhibit 1 of the Complaint, date from March 5, 2018 to November 29, 2018. And the challenged transfers to Xtreme, which number 19 and are listed in Exhibit 2 of the Complaint, date from January 19, 2016 to November 21, 2018. Yet there is not a single allegation in the Trustee's Complaint that actually connects one of these transfers, in temporal scope or in any other way, to any misconduct by Ahern Rentals or Xtreme that supports the Trustee's claims.

In fact, of the 123 substantive paragraphs in the Factual Allegations – the summary references to The Transfers attached as Exhibits 1 and 2 and the Triggering Creditors notwithstanding – there are only 46 paragraphs where a specific date or time certain is even mentioned or can be ascertained in some way from the corresponding allegations. *See* Complaint ¶¶ 8, 19-21, 26-27, 29, 32, 39-40, 53, 55-56, 58, 60-61, 65-70, 72, 82, 89-96, 98-99, 101, 103, 106, 108, 111-112, 116, 121-126. Of those with dated allegations, then, only half – 23 paragraphs – include any actions purportedly taken in 2016 or later. *See* Complaint ¶¶ 19-21, 27, 61, 82, 89-96, 103, 106, 108, 111-112, 116, 121-123. And most telling, of those paragraphs, exactly 1 inconsequential paragraph actually references actions attributed to Defendants, Ahern Rentals or Xtreme. *See* Complaint ¶¶ 27.

This is not to oversimplify the analysis of the Trustee's wholly inadequate pleading, of course, but simply to provide the necessary context for the Court's review. It is true there was a Carpoft Ponzi Scheme and that the Trustee alleges this caused the DC Solar entities to become insolvent. It is also true that the Trustee alleges (although Defendants deny) that the Defendants took actions, albeit prior to 2016, to further the scheme and that this, in turn, allegedly provides support for the eight (8) causes of action brought against each Defendant. But it is also true is that each and every one of the allegations pertaining to the actual Defendants named herein are wholly disconnected from,

1 and earlier in time, than each and every transfer that is the target of the Trustee's Complaint. This is
 2 fatal to all of the Trustee's claims, and most especially of those sounding in fraud. Further, should
 3 the Trustee seek to amend to actually tie any allegation to any challenged transfer, such amendment
 4 would be futile where: (i) the Trustee lacks standing to assert claims obviously belonging solely to
 5 one creditor; (ii) the Trustee's claims are barred by the doctrine of *in pari delicto*; and (iii) the Trustee
 6 otherwise fails to assert all of the necessary elements of her claims, especially as to Defendant Xtreme.

7 For all of these reasons, as stated more specifically herein, the Trustee's claims simply cannot
 8 withstand this Court's application of the motion to dismiss standard.

9 II.

10 LEGAL ARGUMENT

11 A. Applicable Legal Standards.

12 The court has discretion to dismiss the complaint in an adversary proceeding when a plaintiff
 13 fails to "allege facts sufficient to state a plausible claim for relief." *Matter of Lee*, 781 F.App'x 677,
 14 678 (9th Cir. 2019), citing Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
 15 Furthermore, the court does not abuse its discretion in dismissing an action without leave to amend
 16 when an amendment would be futile. *Id.* A complaint's factual allegations must be enough to raise
 17 a right to relief above a speculative level. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
 18 (2007); *In re: Greenstein*, 589 B.R. 854, 861-65 (C.D. Cal. 2018), *aff'd*, 788 F.App'x 497 (9th Cir.
 19 2019).

20 A motion pursuant to Rule 12(b)(6) must be granted where there is either "no cognizable legal
 21 theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Siaperas v.*
 22 *Montana State Comp. Ins. Fund*, 480 F.3d 1001, 1003 (9th Cir. 2007). In considering "a motion to
 23 dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most
 24 favorable to the non-moving party." *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658,
 25 661 (9th Cir. 1998) (citation omitted). A court does not necessarily assume the truth of legal
 26
 27
 28

1 conclusions merely because they are cast in the form of factual allegations. *See Clegg v. Cult*
 2 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff's obligation to provide the
 3 grounds for relief requires more than labels, conclusions, and a formulaic recitation of the elements
 4 of the cause of action. *Twombly*, 550 U.S. at 555.

5 Under *Twombly* and *Ashcroft*, a court must undertake a two-step process in ruling on a motion
 6 to dismiss for failure to state a claim. First, the court must determine what is merely a legal conclusion
 7 and what is a factual allegation. *See Ashcroft*, 566 U.S. at 678 (citing *Twombly*, 550 U.S. at 555)
 8 (“[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
 9 do not suffice.”). Second, the court must determine whether the factual allegations aver a plausible
 10 claim for relief. *See id.* at 679. Dismissal is appropriate whenever the facts as alleged do not amount
 11 to more than a mere possibility of a claim. *See id.*

12 Finally, should the issue arise, there are two exceptions to the requirement that consideration
 13 of extrinsic evidence converts a Rule 12(b) motion to a summary judgment motion. First, a court
 14 may consider “material which is properly submitted as part of the complaint” on a motion to dismiss
 15 without converting the motion to dismiss into a motion for summary judgment; if the documents are
 16 not physically attached to the complaint, they may be considered if the documents “authenticity...is
 17 not contested” and “the plaintiff’s complaint necessarily relies” on them. *See Lee v. City of Los*
 18 *Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

19 **B. The Adversary Complaint Must Be Dismissed Because the Bankruptcy Trustee**
 20 **Lacks Standing to Assert Claims Belonging Solely to a Creditor.**

21 A bankruptcy trustee has a special role. The trustee “stands in the shoes of the bankrupt
 22 corporation and has standing to bring any suit that the bankrupt corporation could have instituted had
 23 it not petitioned for bankruptcy.” *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir.2005)
 24 (internal quotation marks omitted); 11 U.S.C. §§ 704(1), 541(a)(1). However, the trustee's power is
 25 limited. The trustee may only assert claims belonging to a debtor corporation and “has no standing
 26 generally to sue third parties on behalf of the estate's creditors.” *Smith*, 421 F.3d at 1002 (internal
 27 quotation marks omitted); *see also Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d
 28 Cir.1991) (citing *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972) (“[a] claim

1 against a third party for defrauding a corporation with the cooperation of management accrues to
2 creditors, not to the guilty corporation.”).

3 Here, the Trustee’s entire adversary proceeding against these specific Defendants is
4 conditioned upon the role, if any, each played in furthering the Carpoff Ponzi Scheme to the detriment
5 of the DC Solar investors. The only specific allegations, however, pertain to the investor group Solar
6 Eclipse Fund IX (“Fund IX”). *See* Complaint, Sec. V, ¶¶ 40-64. Notably none of the Fund IX-related
7 allegations mention Defendant Xtreme in any way, which deficiency is discussed in great detail in
8 Section D, below; indeed, the only allegations against Xtreme are generally that they manufactured
9 the mobile solar generators (“MSGs”) that were the focus of the tax equity investment scheme
10 perpetuated by Carpoff. *See* Complaint, ¶¶ 71-77. But the losses to Fund IX occasioned by the
11 Carpoff Ponzi Scheme scheme are, in fact, the only specific allegations made by the Trustee against
12 Defendant Ahern Rentals, and this clear creditor claim exceeds the Trustee’s power in an adversary
13 proceeding.

14 C. **The Adversary Complaint Must Be Dismissed Because the Doctrine of In Pari**
15 **Delicto Bars the Trustee’s Claims.**

16 Even if the Court finds the Trustee enjoys general standing to bring this adversary proceeding
17 as pled, her claims are nevertheless barred. The Trustee’s own allegations, as set forth in the
18 Complaint, establish for the purposes of this Motion that insiders of the Debtor DC Solar entities,
19 including Jeff Carpoff, were “perpetrating a Ponzi scheme...through DC Solar and other entities.”
20 *See* Complaint, ¶ 14. The Trustee goes on to detail how the scheme worked, how Federal law
21 enforcement raided the Debtor entities in December 2018, shortly after the last transfers targeted
22 herein, and the instant Bankruptcy followed shortly thereafter. *See* Complaint, ¶¶ 15-21. And, the
23 Trustee provides the allegations of how it believes Ahern Rentals and Xtreme participated in or
24 otherwise helped perpetuate the scheme. *See* Complaint, ¶¶ 40-64, 71-77. These allegations of
25 misrepresentations and other misconduct by the DC Solar entities and DC Solar insiders require
26 dismissal for a second, independent reason: the doctrine of *in pari delicto*.

27 The *in pari delicto* doctrine has been widely applied by bankruptcy courts to deny trustees
28 and other successors to debtors standing to pursue claims on behalf of bankruptcy estates. For

example, in *USACM Liquidating Trust v. Deloitte & Touche*, 754 F.3d 645 (9th Cir. 2014), the court held that a Chapter 11 liquidating trustee lacked standing to pursue the Debtor's accounting firm for aiding and abetting in the debtor's breach of fiduciary duty. *In pari delicto* is a doctrine which generally provides that "[i]n case of equal fault the condition of the party defending is the better one." *Kardoh v. United States*, 572 F.3d 697, 700 (9th Cir. 2009) (quotation omitted). It has been recognized as an affirmative defense which "prohibits plaintiffs from recovering damages resulting from their own wrongdoing." *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006). The doctrine generally arises out of the theory that courts should not become involved in resolving disputes among wrongdoers, but instead should leave them where their own wrongdoing has left them. *Id.* Denying judicial relief to a wrongdoer "is an effective means of deterring illegality." *Id.*

In *In re Mortgage Fund '08 LLC*, 527 B.R. 351, 366–67 (N.D. Cal. 2015), a district court acknowledged that the Ninth Circuit had not directly addressed the application of the *in pari delicto* doctrine to a bankruptcy trustee, but concluded that the Ninth Circuit would likely follow other circuits in applying the doctrine. It found that, although the Ninth Circuit has not directly addressed the issue, every circuit to have considered the question has held that a defendant "sued by a trustee in bankruptcy may assert the defense of *in pari delicto*, if the jurisdiction whose law creates the claim permits such a defense outside of bankruptcy." *Id.* at 367. Nevada has long recognized the doctrine's application. *Shimrak v. Garcia-Mendoza*, 112 Nev. 246, 251-52, 912 P.2d 822, 826 (1996); *see also In Re Americo Derivative Litigation*, 127 Nev. 196, 216, 252 P.3d 681, 694 (2011) (recognizing *in pari delicto* doctrine application to corporations and shareholder derivative suits).

The Ninth Circuit has not addressed, in a published opinion, the applicability of the *in pari delicto* doctrine to claims brought by a liquidating trustee. However, in an unpublished decision, the Ninth Circuit affirmed a decision by Judge Chesney of this Court in which she held that the *in pari delicto* defense could be asserted against a bankruptcy trustee because "[w]here, as here, a bankruptcy trustee files claims on behalf of the bankruptcy estate, § 541(a)(1) ... provides that the trustee's rights are no greater than the rights of the debtor." *In re Crown Vantage, Inc.*, No. 023836 MMC, 2003 WL 25257821, at *6 (N.D.Cal. Sept. 25, 2003), *aff'd Crown Paper Liquidating Trust v. Pricewaterhousecoopers LLP*, 198 Fed. Appx. 597 (9th Cir.2006) ("We affirm for the reasons set

1 forth in the well-reasoned district court orders filed on September 25, 2003, July 12, 2004, March 28,
2 2005 and March 30, 2005, in this consolidated appeal.”), cert. denied, *Crown Paper Liquidating Trust*
3 *v. PricewaterhouseCoopers*, 549 U.S. 1253, 127 S.Ct. 1381 (2007).

4 The *in pari delicto* doctrine applies here to bar the Trustee from pursuing the Complaint. The
5 Trustee stands in the shoes of the Debtor DC Solar entities and is subject to any defenses that could
6 be asserted against them. As the willing participants in the Carpoﬀ Ponzi Scheme that hastened their
7 own insolvency and demise, they may at best be said to be *in pari delicto* with the Defendants, if the
8 Complaint allegations are taken as true for purposes of this Motion. And, the brief period in which
9 the DC Solar governance may have changed prior to the filing of the Bankruptcy petition does not
10 change the Court’s analysis. See, e.g., *Giacometti v. Arton Berm, Ltd. (In re Sukanto Sia)*, 349 B.R.
11 640, 655 (Bankr. D. Hawaii 2006) (holding the issue of the trustee’s standing to attack alleged civil
12 conspiracies turns on timing, and doctrine of *in pari delicto* would prevent pre-bankruptcy claims
13 against Sia and his co-conspirators from passing to the bankruptcy estate, as such claims, if any,
14 against prepetition co-conspirators of the debtor belong to individual pre-bankruptcy creditors).

15 **D. The Adversary Complaint Claims of Preference and Fraudulent Transfer Must**
16 **Be Dismissed Because the Trustee Fails to Allege Essential Elements.**

17 As a final basis for dismissal, the Trustee has failed to allege essential elements of her transfer
18 claims based on preference and fraud. The preference claim fails as to Defendant Xtreme in its
19 entirety, where the Complaint contains no substantive allegations beyond those that Xtreme and the
20 DC Solar entities had a manufacturing agreement between them and Xtreme may have “manufactured
21 less MSGs than DC Solar paid for.” See Complaint, ¶ 72, 118. These are the only allegations in the
22 Complaint that remotely implicate transfers, and even then the timing appears to pre-date the actual
23 challenged transfers. The remaining allegations all concern the imputed knowledge of Evan Ahern
24 regarding the Carpoﬀ Ponzi Scheme but in no way reference transfers. See Complaint, ¶¶ 71-77. The
25 Trustee’s preference claim as to Xtreme therefore fails because the Trustee’s own allegations show
26 no more than transfers were made in the ordinary course of business. “A complaint may be subject
27 to dismissal under Rule 12(b)(6) when an affirmative defense...appears on its face.” *Leveto v.*
28 *Lapina*, 258 F.3d 156, 161 (3rd Cir. 2001) (quotation omitted). And a transfer may not be avoided as

1 a preference if “such transfer was...made in the ordinary course of business or financial affairs of the
2 debtor and the transferee, or made according to ordinary business terms.” 11 U.S.C. § 547(c)(2).

3 The fraud claims also fail in their entirety, as to both Xtreme and Ahern Rentals, because all
4 such claims lack the minimum specificity required under Rule 9(b). Under Rule 9(b), “[i]n alleging
5 fraud or mistake, a party must state with particularity the circumstances constituting the fraud or
6 mistake.” *UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*, 117 F.Supp.3d 1092, 1107-08 (C.D.
7 Cal. 2015) (internal citations omitted). The requirement to plead with particularity is further
8 explained to require the “time, place and specific content of the false representations as well as the
9 identities of the parties to the misrepresentations.” *Id.* It is in this area that the myriad problems with
10 the Trustee’s Complaint are most obvious.

11 At a minimum, the Trustee’s Complaint fails to allege fraud with the requisite particularity in
12 any respect, much less in connection with any challenged transfer. It does not point to specific
13 statements made by either Defendant or provide the “who, what, when, where” allegations required
14 of a fraud claim. The threadbare allegations that are included fail to connect particular statements to
15 specific transfers or to provide any meaningful opportunity for Defendants to understand clearly or
16 refute the allegations against them. Anything the Trustee does assert with specificity is tied to the
17 Carpoﬀ Ponzi Scheme only in the most general sense and is unavailing in both substance and timing.
18 As a final matter, it is not enough for the Trustee to simply “lump together” the allegations in the way
19 she has regarding the Defendants’ alleged participation in the scheme. The Complaint provides
20 separate paragraphs and separate causes of action, but in the end, it is basically all the same argument
21 that but for the actions of Defendants to provide credibility to or cover for the misrepresentations of
22 Carpoﬀ, the scheme would have failed sooner. The Defendants are distinct entities, and Rule 9(b)
23 “does not allow a complaint to merely lump multiple defendants together but requires a plaintiff to
24 differentiate their allegations when suing more than one defendant...and inform each defendant
25 separately of the allegations surrounding his participation in the fraud.” *UMG Recordings*, 117
26 F.Supp at 1107-09 (emphasis added) (citing *Schwartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir.
27 2007)).

1 For these additional reasons, the Trustee's claims for preference and fraud should be
2 dismissed.

3 **III.**

4 **CONCLUSION**

5 For the reasons set forth herein, Defendants respectfully request the Court grant the instant
6 Motion to Dismiss, dismiss with prejudice all claims asserted by the Trustee against the Defendants,
7 and each of them, and grant such other and further relief as the Court deems just and proper.

8 Dated this 2nd day of March, 2022.

9 **FOX ROTHSCHILD LLP**

10
11 /s/ Mark J. Connot

12 MARK J. CONNOT

13 mconnot@foxrothschild.com

14 KEVIN M. SUTEHALL

15 ksutehall@foxrothschild.com

16 COLLEEN E. McCARTY

17 cmccarty@foxrothschild.com

18 1980 Festival Plaza Drive, Suite 700

19 Las Vegas, Nevada 89135

20 Telephone: (702) 262-6899

21 Facsimile: (702) 597-5503

22 *Attorneys for Defendants Ahern Rentals, Inc.*
23 *and Xtreme Manufacturing, LLC*
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fox Rothschild LLP and that on the 2nd day of March, 2022, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure, I served a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS TRUSTEE'S ADVERSARY COMPLAINT WITH PREJUDICE** via the Court's CM/ECF system as follows:

Jeffrey L. Hartman, Esq.
HARTMAN & HARTMAN
510 W. Plumb Lane, Suite B
Reno, Nevada 89509
notices@bankruptcyreno.com

Michael S. Budwick, Esq. (*pro hac vice*)
Solomon B. Genet, Esq. (*pro hac vice*)
Gil Ben-Ezra (*pro hac vice*)
MELAND BUDWICK, P.A.
3200 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
mbudwick@melandbudwick.com
sgenet@melandbudwick.com
gbenezra@melandbudwick.com

Attorneys for Plaintiff
Christina W. Lovato, Chapter 7 Trustee

/s/ Doreen Loffredo
An employee of Fox Rothschild LLP